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LUCK CONST. CO. v. RUSSELL COUNTY.

Sept. 11, 1913.

[79 S. E. 393.]

1. Counties (§ 205*)—Disallowance of Claims—Appeal—Filing Plea of Offset.—While under Code 1904, §§ 838, 843, and 844, the manner of suing a county is by "appeal" from the action of the board of supervisors upon presentation of the claim, the determination of the board is not an adjudication of the case, and the court to which the "appeal" is taken is not an appellate court in the sense that a plea of offset cannot be filed therein.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 328-334; Dec. Dig. § 205.* 3 Va.-W. Va. Enc. Dig. 689.]

2. Counties (§ 206*)—Claims against County—Effect of Allowance.—The allowance of a claim against a county by the board of supervisors is not an adjudication of the claim, and does not estop the county from setting up a defense to the claim when subsequently sued upon it.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 322, 323, 325-330; Dec. Dig. § 206.* 3 Va.-W. Va. Enc. Dig. 689.]

3. Highways (§ 113*)—Actions against Counties—Pleading—Sufficiency of Plea of Offset.—In an action against a county for the balance of the contract price for constructing a road, a plea of offset, alleging that plaintiff failed to perform its agreement and that the county was damaged thereby in excess of the amount claimed, his sufficient to entitle the county to recover from the plaintiff.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 348-352, 355; Dec. Dig. § 113;* Contracts, Cent. Dig. § 1335. 12 Va.-W. Va. Enc. Dig. 266; 14 Va.-W. Va. Enc. Dig. 924; 15 Va.-W. Va. Enc. Dig. 903.]

4. Highways (§ 113*)—Contracts—Construction—Road Construction Contract.—A contract with a county for the construction of a road provided that payments should be made on the engineer's estimates, that in case any work or material should be unsatisfactory to the engineer they should be removed, that the engineer should settle all disputes, and that no work should be regarded as accepted until final acceptance of the whole work. Held that, in view of the last provision, the engineer's estimates were not conclusive or a final acceptance and did not prevent inquiry as to whether the work embraced therein had been done according to contract.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 348-352, 355; Dec. Dig. § 113;* Contracts, Cent. Dig. § 1335. 13 Va. W. Va. Enc. Dig. 980; 14 Va.-W. Va. Enc. Dig. 1102; 15 Va.-W. Va. Enc. Dig. 1103.]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

5. Trial (§ 253*)—Instructions—Ignoring Evidence.—An instruction, in an action against a county for the balance due on a road construction contract, that if the facts therein stated are true the county is estopped from denying that certain work was not according to contract, which disregards evidence that the plaintiff induced the action claimed to constitute an estoppel by fraud, was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.* 7 Va.-W. Va. Enc. Dig. 724; 14 Va.-W. Va. Enc. Dig. 564; 15 Va.-W. Va. Enc. Dig. 515.]

6. Estoppel (§§ 54, 59*)—Equitable Estoppel—Persons to Whom Available.—The doctrine of estoppel in pais is an equitable one, and it cannot be taken advantage of by one claiming to have been influenced by the conduct of another to his injury, who acted with knowledge of the facts relied on as constituting an estoppel, much less by one whose own acts or fraud induced conduct on the part of another alleged to constitute an estoppel.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 128-135, 146, 147; Dec. Dig. §§ 54, 59.* 5 Va.-W. Va. Enc. Dig. 267; 14 Va.-W. Va. Enc. Dig. 406; 15 Va.-W. Va. Enc. Dig. 348.]

7. Trial (§ 252*) — Instructions — Applicability to Issue.—A requested instruction, in an action against a county on a contract, that plaintiff is entitled to recover if the work was performed according to the specifications, "as directed by the engineer," was properly modified by striking out the words quoted, where the contract provided that the work should be done in accordance with the specifications and to the satisfaction of the county and engineer.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252. 7 Va.-W. Va. Enc. Dig. 723.]

8. Highways (§ 113*) — Contracts — Construction of Roads — Responsibility for Acts of Engineer—Fraud of Other Party—Mistake.—The estimates or other acts of the engineers under a contract with a county for the construction of a road are not binding upon either party, where induced by fraud of the other party or the result of fraud or mistake so great as to amount to fraud on the part of the engineers.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 348-352, 355; Dec. Dig. § 113;* Contracts, Cent. Dig. § 1335. 13 Va.-W. Va. Enc. Dig. 990; 14 Va.-W. Va. Enc. Dig. 1102; 15 Va.-W. Va. Enc. Dig. 1103.]

9. Trial (§ 260*)—Instructions—Other Instructions Covering Same Point.—Instructions that the persons who were required to perform certain duties under a contract were the engineers within its meaning were unnecessary, and the court did not err in refusing them,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

where the jury were instructed that if they believed that certain persons, whom the evidence showed were the ones who performed such duties, were appointed to perform them, that they were the engineers.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.* 7 Va.-W. Va. Enc. Dig. 742; 14 Va.-W. Va. Enc. Dig. 565; 15 Va.-W. Va. Enc. Dig. 521.]

Error to Circuit Court, Tazewell County.

Action by the Luck Construction Company against the County of Russell. Judgment in favor of the defendant, and the plaintiff brings error. Affirmed.

Hart & Hart, of Roanoke, *Chapman & Gillespie*, of Tazewell, and *Finney & Wilson*, of Lebanon, for plaintiff in error.

H. A. Routh, of Lebanon, and *Henson & Bowen* and *A. S. Higginbotham*, all of Tazewell, for defendant in error.

VIRGINIAN RY. CO. *v.* BELL.

Sept. 11, 1913.

[79 S. E. 396.]

1. Railroads (§ 282*)—Injuries to Mail Clerk—Contributory Negligence—Instructions.—In an action for injuries to a railway mail clerk, where there was evidence that he knew of the defective condition of the car, and that the door would shut upon a sudden checking of the speed of the train, and that he failed to take such precautions for his safety as he could have done, the defendant was entitled to have the question of contributory negligence submitted to the jury clearly and fully.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 910-923; Dec. Dig. § 282.* 2 Va.-W. Va. Enc. Dig. 707; 14 Va.-W. Va. Enc. Dig. 195; 15 Va.-W. Va. Enc. Dig. 162.]

2. Railroads (§ 282*)—Injuries to Mail Clerk—Contributory Negligence—Instructions.—In such an action, instructions given for the plaintiff, which only impliedly require the jury to find freedom from contributory negligence by stating that they must find that the negligence of the defendant was the sole proximate cause of the injury, and by placing the burden of proving contributory negligence upon the defendant, do not submit fully and clearly the question of contributory negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 910-923; Dec. Dig. § 282.* 2 Va.-W. Va. Enc. Dig. 707; 14 Va.-W. Va. Enc. Dig. 195; 15 Va.-W. Va. Enc. Dig. 162.]

3. Trial (§ 267*)—Instructions—Applicability to Evidence—Injuries to Passengers.—In an action for personal injuries to a railway

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.